No. 88-6546

In The

Supreme Court of the United States

October Term, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF THE STATES OF NEW MEXICO, SOUTH DAKOTA AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Amici respectfully move for leave to file the attached Brief Out of Time in Support of Petitioner, pursuant to

Rule 36.4 of the Rules of this Court. After a decade of vigorous participation in each case before this Court when the scope of tribal jurisdiction was at issue, *amici* inadvertently neglected in this case to properly pursue and coordinate the filing of a timely brief. This neglect has resulted in a situation where the argument of the States ~~are~~ not briefed for the Court. Nevertheless, the issue to be decided in this case will undeniably affect the jurisdiction of all States with Indian Reservations, as in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, 106 L.Ed 2d 343 (1989). For this reason, and to provide assistance to the Court not otherwise available, this Motion and *amici* brief are submitted.

The United States, the Salt River Pima-Maricopa Indian Tribe and numerous *amici* Tribes have filed briefs in support of tribal jurisdiction. Obviously these briefs do not reflect the arguments or the vital interests of *amici* States, noted in the submissions in *Oliphant*, *Montana*, and *Brendale*. Nor could they be expected to advocate or protect jurisdiction arguably vested in any State. On the other side, only Petitioner, with Court appointed counsel, representing an individual charged with a crime, with distinct ethical and other obligations readily distinguishable from the Attorneys General of the respective States, opposes this quest for expanded tribal jurisdiction. While Petitioner has briefed the question presented admirably, Court appointed counsel cannot represent the interests of *amici*. Nor should he be expected to bring a perspective to

this Court backed up by a decade of involvement in litigation of this type, similar to that which the United States has filed against him. State interests are not any less substantial, because in this instance, only non-member Indians, rather than non-Indians are involved. *Fletcher v. Peck*, 6 Cranch 87, 147 (1810).

Petitioner has consented to the filing of this brief. For these reasons, considerations related to those noted in cases such as *Williams v. Georgia*, 348 U.S. 957, 349 U.S. 375, 380-81 (1955) and *Bob Jones University v. United States*, 456 U.S. 922 (1982), 459 U.S. 812 (1983) also lend support to this Motion.

The majority of other States ordinarily interested in Federal Indian Law issues, could not be notified or requested to join in this Motion or brief because of time restrictions.

Respectfully submitted,

HAL STRATTON
Attorney General
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ROGER A. TELLINGHUISEN
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INTEREST OF AMICI CURIAE

The interest of *amici* is set forth in the Motion accompanying this brief.

SUMMARY OF ARGUMENT

In recent years, *amici* and other States have vigorously participated in the briefing and argument of cases before this Court where similar issues have been raised. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845 (1985) and, most recently, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, ___ U.S. ___, 106 L.Ed 2d 343 (1989), are representative of this effort. In general, the opinions of this Court in each of these cases reflect historical arguments and documentation that *amici* found persuasive. Importantly, the United States always disagreed. This past position of *amici* and the United States is significant now in several respects.

ARGUMENT

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors to the United States from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves. Fletcher v. Peck*, 6 Cranch at 147; *Oliphant*, 435 U.S. at 209 (emphasis as in original).

We would like to begin, as Mr. Justice Stewart did in oral argument in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), with what is necessary to decide in this case and what is not. Tr. of Oral Argument, at 29, *Oliphant*. Here, as in *Oliphant*, we submit the question is

whether or not Indian Tribes have the criminal jurisdiction claimed. The question is not, if they do not, who does? But, the United States seeks to put the cart before the horse, as it has in other cases. According to the United States, if Indian Tribes are not allowed to exercise criminal jurisdiction over non-member Indians, a jurisdictional void, "beyond any legal system" would "seriously threaten the maintenance of law and order" on the reservations. Br. for U.S. at 8. This is a serious charge, so this is where we will begin, and even here, the United States misses the mark.

Amici and other States are very much involved in law and order issues on nearly all Indian reservations. There are many non-Indians on Indian reservations today. *Brief for the States*, Appendix A, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation et al.*, 106 L.Ed 2d 343 (1989). In nearly all reservations, the interests of many of these non-Indians are indistinguishable from those of non-member Indians. There is no question that these individuals are subject to state jurisdiction and prosecuted when necessary.

In States without Public Law 280 jurisdiction (Act of August 15, 1953, ch 505, 67 stat. 588), such as North Dakota and South Dakota, non-member Indians are subject to State jurisdiction.[1] The record in *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) establishes that the Chippewa defendants were charged by North Dakota

[1] This is apart from the fact that South Dakota also asserts Public Law 280 jurisdiction on highways through Indian country. The highway claim has been recently upheld in *State v. Onihan*, 427 N.W. 2d 365 (S.D. 1988) and federal trial court, *Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989) (Appeal Pending).

while *Greywater* was pending in the lower court. *Greywater* at 490 n. 3. See Appendix A, *infra*. And in South Dakota, evidence of the State's involvement in law enforcement on Indian reservations with regard to non-member Indians is presently before the South Dakota Supreme Court in a case involving the arrest of a member of a Tribe that has not been federally recognized. *State v. Daly*, No. 16719. Similarly, after a federal district ruling that a member of a terminated Tribe was not an Indian for federal criminal law purposes, *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), South Dakota assumed jurisdiction and is prosecuting in State court. See *State v. St. Cloud*, S.D. Sup. Ct. No. 16899 (Intermediate Appeal Pending). In fact, *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) attests that at least until *1962*, many States were exercising criminal jurisdiction even over members of the tribes within their respective reservations.

Moreover, many, if not most, reservation offenses prosecuted by other States, are sanctioned by Public Law 280, a fact that the United States obscures in its portrait of a potential jurisdictional void. As a result, in these Public Law 280 States, such as Washington, the jurisdictional void does not even arguably exist. For this Court to sanction Tribal criminal jurisdiction over non-member Indians would only further complicate a difficult system that has, nevertheless, worked relatively well in these States for decades.

In other instances, where jurisdictional impediments have previously existed, cooperative agreements have been utilized to solve many day to day problems. Certainly, such agreements appear more promising than the alternative urged by the United States in this case. Other

solutions are also possible.[2] State courts can review older decisions in light of *Oliphant*, *Montana*, and this case. *Washington v. Confederated Tribes*, 477 U.S. 134 (1980) and *Rice v. Rehner*, 463 U.S. 713 (1983) have also recently refined the principles of tribal self-government applicable here. And the home tribe of an enrolled member might arguably retain some personal jurisdiction in a situation like the one presented here. Or at the end of the day, Congress might expand the role of the United States or further clarify or remove other lingering jurisdictional impediments. One thing is certain. The suggestion of the United States that this Court recognize tribal criminal jurisdiction over non-member Indians to fill a void that does not exist, (whether it is limited to enrolled non-member Indians or to the more novel significant "contacts" Indians of the Court of Appeals), promises only more confusion. The fact that such confusion should exist at the expense of the Constitutional Rights of any citizen of the United States, not a member of the prosecuting tribe, further undermines this suggestion. All of which brings us back to what, we submit, is necessary to decide in this case.

1. In recent years, *amici* and other States have vigorously participated in the briefing and argument of cases before this Court where similar issues have been raised. *Oliphant*, *Montana*, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845 (1985) and, most recently, *Brendale*, are representative of this effort. In general, the Opinions of this Court in each of these cases reflect historical arguments and documentation that *amici*

---

[2] See *Keeble v. United States*, 412 U.S. 205 (1973).

argued and the Court found as persuasive. Importantly, the United States always disagreed. In fact, the United States formally resisted and rejected each argument of substance in each case (except *Brendale*) until this Court announced is Opinion. Even then, the United States acknowledged only the most narrow application, while at the same time it renewed all remaining arguments in related litigation then pending. This past position of *amici* and the United States is significant now in several respects.

a. First, the submission by *amici* that the analysis and principles set forth in *Oliphant*, *Montana*, and *Brendale* are controlling here, while briefly made, is therefore most definitely not lightly advanced or briefly considered. Over a decade of effort in these cases substantiates this position. Out of time, *amici* can only reiterate that the reasoning and holdings of each of these cases makes clear that Indian Tribes were not intended to exercise criminal jurisdiction over non-member Indians. In this regard, the opinion of Judge Lay in *Greywater*, is supportive of *amici's* view and worthy of this Court's consideration.[3]

b. The "Indian v. Indian" exception argument of the United States does not even approach the "express congressional delegation" this Court has properly insisted on

---

[3] The *Greywater* record also accurately reflects the realities of life in "Indian Country" for anyone whose perspective is so distant as to need or appreciate a closer look. See the uncontested affidavit of Defendant Mary Jo Greywater, Appendix, 163, *Greywater*, and the Brief of Appellant, 8-10, *Greywater*, that sets forth Defendant Joshua Greywater's testimony at the hearing regarding this same tribal judge. Petitioner has lodged copies of all of the *Greywater* appellate briefs and the appendix with the Office of the Clerk.

in the past, as a condition precedent to a recognition of expanded tribal jurisdiction. *Oliphant*, 435 U.S. at 208, *Montana*, 450 U.S. at 564, and *Brendale*, 106 L.Ed 2d at 346. The United States has argued around this principle before, and hopefully this will be the last such argument to this Court, at least in the absence of any heretofore undisclosed treaty related claim. (The Pima-Maricopa Tribe appears to be a non-treaty tribe occupying an executive order reservation.) The almost "bright line" established by *Oliphant*, *Montana* and *Brendale* promises, in the foreseeable future, to bring to a conclusion much of this and other related jurisdiction litigation.

c. Whatever else Congress might have intended to accomplish by the "Indian v. Indian" exception, (something far short of the required "express congressional delegation" in any event), one other point is unmistakably clear. The subsequent Jurisdictional history painted by the United States ("clear historical pattern") is not nearly as clear as the United States would have this Court now believe.

(1). The Reply Brief of Petitioner highlights the authorities contrary to the United States' position, including Felix Cohen, at 3-4, 12-18. Additionally, *amici* would note that even the documentation cited by Cohen makes clear that as early as 1904 tribal jurisdiction was limited in Courts of Indian Offenses to Indians "belonging to the reservation". Regulations of the Indian Office, F. Cohen, *Handbook of Federal Indian Law*, at 359 (1942 ed.)

(2). Later and more importantly, a limitation of tribal jurisdiction to tribal members was continued and routinely reflected in the tribal constitutions adopted

after the Indian Reorganization Act of 1934, 48 Stat. 984. Typically, such a constitution would provide:

> Section 1. The judicial powers of the. . . .Tribe shall be vested in court or courts which the tribal council may ordain or establish.
>
> Section 2. The judicial power shall extend to all cases involving *only* members of the. . . .Tribe, arising under the constitution and by-laws or ordinances of the tribe, and to other cases in which all parties consent to jurisdiction. (emphasis added).

Surely, the United States should be aware of these tribal constitutions. The Secretary of Interior, as a matter of record, was required to approve each one pursuant to the Indian Reorganization Act.

At least until 1954, when the Department of Interior was requested to construe a similar limitation, the response was brief and to the point:

> . . . a penal ordinance providing for the prosecution of *Indian nonmembers* who are guilty of violating any law, rule or ordinance for the protection of game and fish on the reservation.
>
> This ordinance reveals that it was adopted pursuant to Article VI, Section 1, Subsection (a) of the constitution. Subsection (a) does empower the tribe to enact ordinances for the protection and conservation of fish and game but *neither that nor any other provision of the constitution confers jurisdiction on the tribe to enforce criminal sanctions against nonmembers of the tribe.* Subsections (1) and (n), after close scrutiny, do not appear to authorize the tribe to impose punitive provisions on nonmembers for fish and game violations subject to the review of the Secretary, for they *transcend the ordinary scope of*

> *authority* of the Indian tribe. Therefore, one basic reason why the ordinance is ineffective, rather than that it has failed to be approved and ratified by the Superintendent and Secretary, is that it was *beyond the constitutional power* of the tribe.

2 Op. Sol. 1637, 1638 (1954) (emphasis added).

In this regard, South Dakota notes the assertion in the Brief Amici Curiae on Behalf of Six American Indian Tribes that the Oglala Sioux Tribe "exercises criminal jurisdiction over all Indians within the reservation, members and nonmembers alike". Brief Amici Curiae at 5. The current Constitution of the Oglala Sioux Tribe, similar to the one set forth above, *on its face*, prohibits this jurisdiction claim:

> ARTICLE V – JUDICIAL POWERS
>
> SECTION 1. The judicial powers of the Oglala Sioux Tribe shall be vested in court or courts which the tribal council may ordain or establish.
>
> SECTION 2. The judicial power shall extend to all cases involving *only* members of the Oglala Sioux Tribe, arising under the constitution and by-laws or ordinances of the tribe, and to other cases in which all parties consent to jurisdiction.

Constitution of Oglala Sioux Tribe, at 5 (emphasis added).[4] How this fact could have escaped *amici* Tribes' attention

---

[4] In order to prudently place assertions dealing with jurisdiction such as this in perspective, in the absence of a response *ad infinitum* from *amici*, reference could be made to reported decisions in representative jurisdictions. These cases accurately reflect jurisdictional history. See for example, *Eugene Sol Louie*

(Continued on following page)

is difficult to imagine especially in light of the habeous corpus petitions on record locally on this issue. Why a tribal constitutional prohibition is seemingly being ignored by the Tribe itself is more readily understandable in light of the general state of affairs in Indian country described in the 1989 Congressional materials set forth in Appendix C, *infra*, which brings us to our last point. A problem exists, anticipated by this Court over a decade ago, that time has only served to compound: Namely, that the Indian Civil Rights Act has not transformed Indian reservations into the bastions of fundamental fairness that the United States and *amici* Tribes would have this Court envision. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 82 (White, J. dissenting) (1978).

2. Perhaps *amici* should have expected that the United States and others would call upon the 1886 "local ill feeling" "deadliest enemies" *Kagama* characterization of State government to support expanded tribal jurisdiction. *Brief for the United States*, 24, 25 n. 36, citing *United States v. Kagama*, 118 U.S. 228 (1886). After all, *amici* have never really responded, as we should have, to this approach and a response is long overdue. In point of fact, for at least four decades, the concern in Congress over the lack of fundamental fairness in Indian country, has focused on the actions of *tribal governments*, not *State governments*. See *Washington v. Yakima Indian Nation*, 439 U.S. 463

(Continued from previous page)

v. United States, 274 Fed. 47 (9th Cir., 1921), *State v. Monroe*, 83 Mont. 556, 274 Pac. 840 (1929) and other cases cited in F. Cohen, *Handbook of Federal Indian Law*, 359 (1942 ed.), *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) and *Dixon v. Rhay*, 396 F.2d 761 (9th Cir. 1968).

(1979), *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *Santa Clara Pueblo v. Martinez*. Most recently, this concern surfaced in the context of a 1988 Report from the United States Department of Justice, Office of Legislative and Intergovernmental Affairs. *Petitioner's Reply Brief*, Appendix 4a. This ten page *federal* report describes the situation on reservations as *"critical"* and concludes that unless remedied:

> . . . individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in *theory* but not in *practice*.

Petitioner's Reply Brief, Appendix 5a, 6a. After the remedy, S. 517, was introduced on March 6, 1989, and after reviewing the supporting *federal* documentation, *amici* and other States passed a resolution in support of the need for this or similar legislation. See Appendix B, *infra*. *Amici* can add nothing to emphasize the concern reflected in the ten pages of Congressional Record dealing with the introduction of this legislation. See Appendix C, *infra*. It reveals a system that, at best, is far removed from that described by the United States and other *amici* Tribes. *Amici* would respectfully submit that both the individuals and the system, and this Court as well, would be better served if the United States directed as much attention to the questions raised in the Congressional Record as it does to the century old "local ill feeling" "deadliest enemies" *Kagama* argument. Perhaps then, the opposition of Tribal governments, that has contributed to blocking legislative efforts on this issue, can be overcome. In the meantime, nothing submitted in this case to date should lead this Court to conclude that the system should be

expanded at the expense of Petitioner's or any other non-member Indian's Constitutional Rights by subjecting them to tribal criminal jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

ATTORNEY GENERAL

STATE OF NORTH DAKOTA
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Bismarck, North Dakota 58505
701-224-2210

Seal

Nicholas J. Spaeth
Attorney General

November 21, 1989

Honorable Roger A. Tellinghuisen
Attorney General
State Capitol
Pierre, SD 57501

Dear Attorney General Tellinghuisen:

Last year the Eighth Circuit Court of Appeals concluded that a tribal court's criminal jurisdiction is limited to tribal members. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). You have requested information regarding the effect of *Greywater* on law and order on Indian reservations in North Dakota. In particular, you want to know if *Greywater* has created a jurisdictional void.

There are four Indian reservations in North Dakota – the Fort Totten Reservation (also known as the Devils Lake Sioux Reservation), the Turtle Mountain Reservation, the Standing Rock Reservation, and the Fort Berthold Reservation. Most of the Fort Totten Reservation is in Benson County. Since *Greywater* the Benson County State's Attorney has prosecuted in state courts Indians who are not members of the Devils Lake Sioux Tribe but who have committed crimes on the reservation. All of the Turtle

Mountain Reservation is in Rolette County. Since *Greywater* the Rolette County State's Attorney has not been presented with a situation in which she must decide whether or not to prosecute a non-member Indian in state court. Nonetheless, were she presented with that situation she has said she would prosecute. The Standing Rock Reservation is in Sioux County. Since *Greywater* non-member Indians had been prosecuted, not in tribal court, but in a "CFR court" established pursuant to 25 C.F.R. Part 11. Were there no such court the Sioux County State's Attorney has said he would prosecute non-member Indians in state court. The Fort Berthold Reservation lies in part of five different counties. Only the state's attorneys from McKenzie County and Mountrail County have been presented with the decision whether or not to prosecute an Indian who is a non-tribal member for a crime committed on the reservation. The state's attorneys from these two counties prosecute such Indians. Furthermore, a "CFR court" has been established on the Fort Berthold Reservation to provide jurisdiction over non-members.

In summary, a jurisdictional void does not exist on reservations in North Dakota. The *Greywater* decision has not led to a breakdown of law and order on North Dakota reservations. Furthermore, I have not heard that there has been a breakdown in law and order on reservations elsewhere within the Eighth Circuit since *Greywater*.

Sincerely,

/s/ Nicholas Spaeth
Nicholas J. Spaeth

pg

APPENDIX B

CONFERENCE OF WESTERN ATTORNEYS GENERAL
THE COUNCIL OF STATE GOVERNMENTS
121 SECOND STREET 4TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
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RESOLUTION NO. 89-02

PROPOSED BY ATTORNEY GENERAL
ROGER TELLINGHUISEN (SD)

SUPPORTING FEDERAL COURT REVIEW OF THE INDIAN CIVIL RIGHTS ACT OF 1968

WHEREAS, Indian tribes have a quasi-sovereign status and, as such, they are not bound by constitutional safeguards. *Talton v. Mayes*, 163 U.S. 376 (1896).

WHEREAS, in 1968, the Congress of the United States enacted the Indian Civil Rights Act of 1968 (ICRA) 25 U.S.C. §§ 1301-3, to provide for the American Indian most of the broad constitutional rights afforded to other Americans.

WHEREAS, in 1978, the Supreme Court of the United States in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), held that, except for habeas corpus, the rights guaranteed by ICRA could not be enforced in federal courts.

WHEREAS, in 1988, a bill was introduced to correct this anomoly and provide federal court authority to enforce individual rights under ICRA.

WHEREAS, the Department of the Interior endorsed this bill as "sensitive to tribal sovereignty and prerogatives, while making enforceable the constitutional rights promised by the ICRA," and the Department of Justice concluded that the bill "balances legitimate tribal interests with a meaningful program to protect individual statutory rights."

WHEREAS, on March 6, 1989, this biil was introduced as S. 517.

WHEREAS, on March 15, 1989, at a meeting of the Conference of Western Attorneys General in Washington, D.C., with the Honorable Manuel Lujan, Secretary of Interior and other officials of the Department of Interior, continued federal support for S. 517 was firmly reiterated.

WHEREAS, the Conference of Western Attorneys General is actively involved in studying and evaluating the interrelationship of federal, state and tribal governments and nearly all aspects of Federal Indian Law.

WHEREAS, support for the concept of federal court review of cases arising under ICRA is important and will help avoid any premature endorsement of other provisions of S. 517.

NOW THEREFORE BE IT RESOLVED that the Conference of Western Attorneys General:

1. Supports the concept of federal court review of cases arising under the Indian Civil Rights Act of 1968 and to this extent, endorses S. 517; and

2. Respectfully requests that hearings on S. 517 be scheduled to allow interested parties the opportunity to express their views.

(RESOLUTION ADOPTED ON AUGUST 3 AT THE 1989 CONFERENCE OF WESTERN ATTORNEYS GENERAL ANNUAL MEETING IN JACKSON, WYOMING.)

APPENDIX C

CONGRESSIONAL RECORD – SENATE

Proceedings of the 101st Cong., 1 Session Vol. 135 Washington, Monday, March 6, 1989, No. 23.

By Mr. HATCH:

S. 517. A bill to provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes; to the Committee on the Judiciary.

INDIAN CIVIL RIGHTS ACT AMENDMENTS

Mr. HATCH. Mr. President, I rise today to introduce the Indian Civil Rights Act Amendments of 1989

TRIBAL GOVERNMENTS AND SOVEREIGNTY

In the 1800's, Congress began establishing Indian reservations on which Indian tribal governments could continue to exercise their sovereign powers. Native Americans, who are members of those tribal governments as well as U.S. and State citizens, are unique among racial minorities. Their actions may be restricted by tribal as well as State and Federal authority.

In that capacity, tribal governments exercise broad criminal and civil jurisdiction over both their members and their territory. They retain all of the powers not specifically denied them and which are consistent with their status as quasi-sovereign governments. While criminal jurisdiction is limited to tribal members, and perhaps

nonmember Indians, tribes exercise broad civil, regulatory, and taxing authority over both Indians and non-Indians who reside within the reservations or who do business with tribal organizations.

While the decisions of these tribal governments reflect the history, culture, religious convictions, and shared values of the tribal leaders and members, the process of tribal government is largely based on a constitutional model. Most tribes, for example, are constitutional in nature and organized pursuant to the Indian Reorganization Act - Wheeler-Howard Act - of 1934. Very few, the Southwest Pueblos are the notable exception, have religious or other traditional forms of Indian governments.

Constitutionally, tribal governments differ from most State and Federal governments. Some of the fundamental checks and balances existing within the Federal and State constitutional framework, for example, are not present at the tribal level. Real power in many tribal governments rests with the tribal council or legislative branch. Tribal councils pass the ordinances, resolutions and other processes which create tribal law. Through standing committees in such areas as social welfare, law enforcement, or the judiciary, tribal councils then perform executive management, and implementation functions as well. The tribal councils often micromanage tribal programs and their function is substantially different from the more general oversight role performed by non-Indian legislative bodies.

Separation of powers into coequal branches of government in order that one may check the potential abuse

of another is not a concept well-established in tribal governments. As a result, tribal governments may lack pluralism, respond more to majority concerns, and ignore minority interests.

In that context, tribal courts exist in only about one-half of the tribal governments. Where courts do exist, they are often a creation of the tribal council and, therefore, subject to and dependent on the council. Rarely do tribal courts exist constitutionally as a separate coequal branch of the tribal government. As a consequence, tribal courts may lack the powers to review tribal council actions, may be otherwise limited jurisdictionally, and may lack independence from the tribal council or tribal chairman.

Tribal governments, because they are neither Federal nor State instruments and because they predate the Constitution, are not restricted by Federal or State constitutional authority. Similarly, tribal governments are not bound by many Federal civil rights statutes including, for example, civil actions for deprivations of statutory or constitutional rights, 42 U.S.C. section 1983, the Voting Rights Act, 42 U.S.C. 1973, and laws prohibiting discrimination in employment, 42 U.S.C. 2000e-1.

THE 1968 INDIAN CIVIL RIGHTS ACT

However, Congress has plenary power over Indian matters. This exceptionally broad congressional authority is found in article I, section 8, clause 3 of the Constitution, which gives Congress the power to "regulate commerce * * * with Indian tribes." In an exercise of its plenary power, the Senate Judiciary Subcommittee on

Civil and Constitutional Rights heard complaints of civil rights violations by tribal governments. The subcommittees held hearings from 1960-1967 and documented widespread civil rights abuses on the part of tribal governments generally.

This record of civil rights abuses by tribes led to the enactment, over objection by tribes, of the Indian Civil Rights Act, as title II of the Civil Rights Act of 1968. The Act applies substantial portions of the Constitution's Bill of Rights and the 14th amendment to tribal government in much the same way that the Federal Bill of Rights restricts the Federal Government. As set out in title II, section 202 of the Indian Civil Rights Act:

No Indian tribe in exercising powers of self-government shall –

(1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) taken any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

In deference to Indian tribal values, however, certain constitutional provisions, including the first amendment's prohibition against establishing religions, were omitted. Other concessions were made to Indian tribal governments and values. Tribes, for example, need not provide indigent criminal defendants with counsel. Much of the concern, and the ultimate concessions, centered on the financial impact of granting broad rights to individuals who come in contact with tribal governments.

EARLY ENFORCEMENT

For 10 years, from 1968 to 1978, the Indian Civil Rights Act was routinely enforced in both tribal and Federal courts. Each Federal appellate court which considered the Indian Civil Rights Act; that is, the Fourth, Eighth, Ninth, and Tenth Circuit Courts, found the act within Congress' power and inferred a private right of action in Federal court to enforce the act's provisions.

The number of reported Federal district court cases between 1968 and 1978 was substantially less than 100 or roughly 10 per year nationwide. One way to read such a statistic is to see the positive impact or value that possible Federal civil rights enforcement has on encouraging tribal compliance with the act. Certainly the tribal exhaustion requirement which Federal courts routinely read into the act tended to resolve many issues at the tribal level without the need for Federal court action.

To be sure, there is little, if any, evidence that between 1968 and 1978 tribal governments suffered substantially as a result of the limited Federal court Indian Civil Rights Act enforcement. For example, there is no evidence that any tribe was forced to terminate its tribal government functions or became insolvent as a result of the act. In fact, there is some evidence that the act had a salutary effect on tribal government by, among other things, checking tribal abuse, providing for a more pluralistic tribal government, and encouraging nonreservation capital investment.

For the most part, pre-1978 Indian Civil Rights Act decisions enforced the act within the context or framework of existing tribal traditions, customs, and values. In

due process cases, for example, Federal courts looked to tribal law or customs for a definition of what process was due. Tribal defense in equal protection litigation often relied on tribal "rational basis"; that is tribal law or custom, not available to non-Indian governments.

TERMINATION OF FEDERAL COURT REVIEW OF INDIAN CIVIL RIGHTS ACT ABUSES

Federal court review came to an end in 1978 with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). There, the Supreme Court said the Indian Civil Rights Act does not provide for a waiver of sovereign immunity and, further, the act fails to provide a private right of action for individuals in Federal court. The court found two distinct and "competing" purposes in the act: First, to protect individuals from tribal abuse of power; and second, to promote Indian self-government. Although the court found that Congress has the power to provide a Federal forum, it said to do so may limit tribal court power and, thereby, lessen or infringe on tribal sovereignty or self-government. Accordingly, the court reused to read in the Indian Civil Rights Act a right of action in Federal court which was not explicitly contained in the act. The court went on to warn the tribes, however, that if they were deficient in applying and enforcing the act, Congress may in the future provide for Federal relief.

CRITICISM OF THE LACK OF FEDERAL COURT REVIEW

Over the last few years, substantial criticism has been raised over the burden often placed on plaintiffs by the

Santa Clara Pueblo decision. While some tribal governments have gone to great lengths to ensure enforcement of the Indian Civil Rights Act guarantees, such is not the case with all tribes. In a 1984 report by the Presidential Commission on Indian Reservation Economies, the commission attacked the fairness of some tribal government proceedings. In its report, the commission states:

> [Failure to adhere to a constitutional principle separating executive, legislative and judicial powers has had a detrimental effect on governmental functioning. For example, the failure to establish a clear separation of powers between the tribal courts, weakening their independence, and raising doubts about fairness and the rule of law. * * * Both Indians and non-Indians complain of political discrimination against them by tribal governments and tribal courts which are arms of tribal governments. Access to tribal physical resources, to the benefits of tribally managed programs, and to tribal employment is considered to be unfair by many Indians. Decisions rendered by tribal courts, which are controlled by tribal councils, are also perceived to be unfair by Indians and non-Indians.

Similar criticism has also been raised by the Federal courts. In the case of *Shortbull v. Looking Elk*, 677 F.2d 645 (8th Cir. 1982), the 8th Circuit Court of Appeals reviewed a case in which the plaintiff claimed that he was wrongfully refused permission to run for tribal office by an action of the tribal council. In addressing the lack of protection for the plaintiff's rights under the Indian Civil Rights Act, the court stated:

> We must, however, express serious concern that Shortbull's rights under [Sec.] 1302 of the Indian Civil Rights Act (ICRA) may never be

vindicated. Shortbull alleges that the tribal court, Chief Judge Red Shirt, ruled that he was entitled to run in the primary election because of the Tribal Council's January 24 resolution. It appears that because of this ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the Tribal Executive Committee, who quashed Judge Red Shirt's orders. Such actions raise serious questions under the Indian Civil Rights Act, but because the Supreme Court determined in *Santa Clara Pueblo* that there is no private right of action under the IRCA. Shortbull has no remedy.
* * *

We are thus presented with a situation in which Shortbull has no remedy within the tribal machinery nor with the tribal officials in whose election he cannot participate [citations omitted], unless and until Congress provides otherwise. [Citing *Santa Clara Pueblo.*] We question whether such a result is justified on the grounds of maintaining tribal autonomy and self-government: it frustrates the ICRA's purpose of "protect[ing] individual Indians from the arbitrary and unjust actions of tribal governments," and in this case it renders the rights provided by ICRA meaningless.

The Tenth Circuit Court of Appeals also attacked the current enforcement situation in the case of *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). In one of the few non-habeas corpus Indian Civil Rights Act cases to provide a federal forum by narrowly construing the Santa Clara Pueblo decision, the court provides some useful insights with reference to the facts and the resulting lack of fairness in that case:

> Plaintiffs Cook, who are non-Indians, had owned the 160-acre tract for about ten years and

had lived there. They decided to build a guest lodge for hunting, and consulted the superintendent of the reservation about the matter. He advised them that projects of this type were encouraged to provide employment. He also stated that there would be no access problem. A license to plaintiffs Cooks was issued for the business. The individuals then formed Dry Creek Lodge, Inc. to build the facilities. This was done with an SBA loan. The lodge was completed and opened, but the next day the tribes closed the road at the request of a nearby Indian family. . . .

The [tribal Joint Business Council directed that access to the Dry Creek Lodge be prevented by the federal officers, and the [Indian family] were apparently to erect the barricade. With the road blocked the persons on the Dry Creek land could not get out and were for all practical purposes confined there until a federal court issued a temporary restraining order. Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed. 25 C.F.R. Sec. 11.22. The consent was not given. The state court cases were removed to the federal court. In the federal court the defendants urged that there was no remedy – no jurisdiction. * * * The Tribal Business Council according to the minutes, directed that the differences between the [Indian] family and the plaintiffs be settled by self-help, and this was done. The plaintiffs, however, did not respond the same way. The defendants argue here, as they did in the trial court, that the plaintiffs have no remedy. There is no forum where the dispute can be resolved and the personal property rights asserted by plaintiffs be considered. * * *

> The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy. The self-help which was suggested to shut down plaintiffs' "business," according to the Council minutes, and which was carried out with the help of the federal police, does not appear to be a suitable device to determine constitutional rights.

In that case, even the dissenting judge acknowledged that dilemma when he stated:

> To me this is a most, disturbing case because of the result I feel compelled to reach. The jury found a violation of the plaintiffs' civil rights recognized by [section] 1302 of the Indian Civil Rights Act, under the most distressing circumstances. And yet it seems we must say that the doors are closed against any orderly redress for the wrongs. State and federal courts are barred by the immunity doctrine from hearing the claims and access was denied to the tribal court, as the majority opinion points out. * * *
>
> [T]hese damage claims are * * * barred * * * unless and until Congress provides otherwise.

Only recently, this criticism by the Federal courts of the status quo was reaffirmed by the U.S. District Court for the District of Montana in the case of Little Horn State Bank versus Crow Tribal Court. After a lengthy review of the facts in which the plaintiff was repeatedly denied his rights by the defendant, the Judge went on to state:

This Court is well aware of the continued promotion of tribal self-government and self-determination. In National Farmers Union Ins. Co. v. Crow Tribe [citation omitted], the Supreme Court directed the federal district court to give tribal legal institutions the "proper respect" by staying its hand in order to allow the Tribal Court a "full opportunity to consider the issues before them." [Citation omitted.] This Court, in keeping with its obligation to uphold the law, will honor that directive.

However, it has become extremely difficult to do so in the face of such decidedly egregious facts as are presented herein. Plaintiff has recognized the sovereignty of the Tribe and has valiantly tried to operate within the Tribal Court system, seeking its approval of a valid judgment entered in the courts of the State of Montana, and assistance in enforcing the same. The Crow Tribal Court, acting as a sort of "kangaroo court" has made no pretense of due process or judicial integrity. Plaintiff was met not only with bias and uncooperativeness, but with a blatantly arbitrary denial of any semblance of due process. The tribal judge's conduct makes a mockery of any orderly system of justice, and renders any attempt to deal with the Tribe in a professional and competent manner a farce. The Court seriously questions whether the conduct of the Tribal Court is befitting the title of a sovereign, and the respect and deference customarily accorded along with that status.

It would appear that the Crow Tribal government changes judges at a whim, to the detriment of non-Indian litigants, and of the Tribe. As a result, the Tribal Court lacks any continuity and uniform precedent which is the foundation of our judicial system. While the tribal members enjoy the protection of their rights under both the United States Constitution and the ICRA,

depending on the forum. It appears that non-Indians are not granted the same privilege of dual citizenship in Tribal Court. If the Crow Tribe wishes to earn the respect and cooperation of its non-Indian neighbors, it must do more to engender that respect and cooperation, not abuse those neighbors who attempt to work within its system.

Let me reiterate that these abuses that are cited by the courts are not necessarily occurring in all or even a majority of the tribal governments. Nevertheless, the situation was serious enough to warrant congressional action in 1988, and it appears that at least with some tribes such is still the case.

THE NEED FOR LEGISLATION

The concerns of the courts that I have been quoting are further supported by an extensive record of the lack of Indian Civil Rights Act enforcement that is currently being compiled by the U.S. Civil Rights Commission. For the last couple of years, the Commission has been holding a series of hearings on this issue. While the Commission's report is not yet complete, the transcripts and hearing records contain many statements that further support the allegations of failure by some tribal governments to adequately enforce the civil rights guaranteed to both tribal and nontribal reservation residents alike.

Because of the enforcement problems that have occurred since the Santa Clara Pueblo case, the time has now come to follow the Supreme Court's dictum and legislate a Federal court remedy. A review of post-Santa Clara Pueblo Federal and tribal case-law, existing Federal

studies, news reports, and other available information, makes clear that rights secured by the Indian Civil Rights Act have been less than fully enforced.

In earlier testimony before the U.S. Civil Rights Commission, the Department of Justice provided some interesting statistics and background with respect to its involvement and monitoring of Indian Civil Rights Act enforcement. I would like to share some of that testimony with my colleagues at this point:

> In the 7 years prior to Santa Clara, the Department of Justice received about 230 complaints of ICRA violations on the part of tribal governments. ICRA complaints during this period accounted for just over 18% of all civil rights complaints involving Indians. Several of these matters were settled by informal discussion between the Department and the affected tribes. Others were not pursued because of non-ICRA commitments on [the part of the Department]. The Department did, however, participate in 6 federal civil lawsuits which raised ICRA issues, including 2 brought solely on ICRA claims. No cases have been brought subsequent to Santa Clara. Most complaints brought to the Department's attention pre-Santa Clara involved allegations of tribal election irregularities. Other alleged violations occurred in the area of tribal employment, law enforcement, i.e. police and court irregularities, and housing assignment policies.
>
> Since the Court's 1978 decision in Santa Clara, the Justice Department has received about 45 ICRA complaints alleging violations of the civil rights of Indians by tribal governments. No action has been taken on any complaint and no effort has been made, post Santa Clara, to invoke the jurisdiction of the federal courts.

> Seventeen complaints allege tribal court irregularities including a failure to allow retained attorneys to appear in tribal court, a failure to permit defendants an opportunity to be heard and the failure to afford criminal defendants a trial by jury. Thirteen complaints allege flaws in the tribal election process including improper interference by the tribal council, fraud and mal-apportioned election districts. Six complaints allege improper tribal hiring practices including political interference and nepotism. Four complaints allege housing violations including non-compliance with tribal housing assignment policies, favoritism and improper interference by the tribal council. The remaining miscellaneous complaints range from an alleged failure to provide tribal benefits equally to all members (similar to the Santa Clara facts) to an allegation of unsanitary and inadequate tribal jail conditions.
>
> The following incidents are representative of the more serious complaints received by the Department since Santa Clara and, to our knowledge, which have gone unreviewed by federal courts. On March 13, 1979 a tribal member was arrested for disorderly conduct by tribal officials. An investigation of the circumstances surrounding his arrest, trial and punishment revealed the following information. The victim was held without bail in pretrial confinement for 5 days. On March 18, 1979 he was transported from the jail and taken to a room containing tribal officials. All other persons were removed from the room. The victim was forced to kneel in front of the tribal officials. He was told that he was charged with disorderly conduct and asked several questions concerning his arrest on March 13th. He was never informed of the statutory rights set out in the ICRA. After a time, a tribal official asked that a rawhide whip

about 2 feet long be brought in the room. When it arrived, the official instructed a subordinate to whip the victim four times, which was done. The victim was sentenced to 30 additional days in jail and returned to jail without medical attention. Other information confirms that the victim's account is an accurate description of how trials are conducted at the tribe. Non-public proceedings, no representation by counsel, no notification of procedural rights and whipping are all customary in criminal proceedings.

A Southwest tribe is districted into several separate council districts. Federal courts have held that the due process clause of the ICRA requires that trial council districts comply with one person, one vote requirements. However, the 1982 election districts exceed the maximum permissible derivation by approximately 200-400% depending upon population base used. A recent redistricting has reduced that deviation to approximately 70%.

In a 1982 complaint, an attorney wrote [the Department] alleging that a tribe refused to permit him to represent his client. The attorney alleged that his client was required to present a case in tribal court while the attorney was present "but only as an observer". According to the attorney's account, when he spoke up on behalf of his client, members of the tribal council tried to have him "removed from the courtroom altogether." He concludes his letter with the observation that "[t]he tribal court system is a total mockery of justice at best and more realistically a fraud" on the tribal members. Subsequently the attorney was "removed" from the reservation by tribal law enforcement authorities. In a February 20, 1985 letter, a tribal member wrote to complain that she and others "have been cheated in tribal elections". She also complained

that tribal members are "coerced into compliance thru [sic] fear of losing their jobs and our civil rights have been flagrantly violated." She told [the Department] that she "cannot be identified for fear of job reprisal". Finally, [the Department] received a September 6, 1985 letter from an Indian who requested our "help in protecting [tribal members] from our government". Following the submission of a recall petition, the tribal council went through the signatures systematically "giving people the choice of being suspended from employment or publicly apologizing for signing the Petition". The letter continues with the allegation that the "Council is threatening us * * * All we want is the right to vote and elect our leaders. We understand this is supposed to be a real right, but so far there is no avenue for enforcement.

In a recent letter from the Justice Department to the U.S. Commission on Civil Rights, the Department provides a summary of complaints it has received since the Santa Clara Pueblo decision. Mr. President, I ask unanimous consent that a copy of that letter and the incident summary be included in the Record immediately following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HATCH, Mr. President, while abuse of rights by individual tribal officials has surfaced since Santa Clara Pueblo; for example, allegations that tribal judges fail to insist on proper standards prior to issuing search warrants, structural problems are also present and, arguably, more important.

Examples of structural Indian Civil Rights Act problems include the failure of tribal governments to insist on independent judicial review or an equally effective Indian Civil Rights Act compliance procedure. Some tribal governments fail to create tribal courts or, where they do exist, extend to them the power of judicial review.

For example, recent news reports out of my home State of Utah indicate that last year a tribal judge on the Ute Indian Reservation was dismissed from his position by the reservation Business Committee when the judge found the committee in contempt of court for failure to pay more more than $500 million in back dividends to new tribal members. While the news articles are not detailed as to all of the specific facts of that case, they do point out that the tribal government has passed a new law prohibiting legal action against the tribe in tribal court. If that is the case, and I believe that it is, then given the Supreme Court ruling in Santa Clara Pueblo that Indian civil rights actions may not be brought in Federal courts, it would appear that at least on the Ute reservation there is no possibility of enforcing the 1968 Indian Civil Rights Act in cases involving the tribal government.

This situation and other complaints regarding lack of enforcement of the Indian Civil Rights Act warrant serious congressional action in the form of hearings. We must determine the scope of the problem and take corrective action in the form of legislation to ensure that individuals will have their civil rights enforced.

Efforts have been made to increase Federal funding and provide effective training programs for tribal systems. However, while appropriate funding and training

levels are important, they will not resolve the Indian Civil Rights Act enforcement problems that do exist. The remedy lies with Federal court enforcement. Federal court enforcement, coupled with a requirement of exhaustion of tribal remedies and limited to equitable relief, will achieve the goal to providing an effective Indian Civil Rights Act compliance program without unnecessarily limiting other legitimate tribal goals.

The bill that I am introducing today does just that. It provides for Federal court review and enforcement after an individual has exhausted his or her tribal remedies. The bill will also prohibit the defense of sovereign immunity in civil rights cases. It is a fair and balanced solution to ensure that all citizens, both Indian and non-Indian, enjoy basic civil rights.

SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1 provides that the act may be cited as the "Indian Civil Rights Act Amendments of 1989."

Section 2 adds a new compliance section of the Indian Civil Rights Act, section 204, following the existing three sections: section 201 [25 U.S.C. 1301], "Definitions"; section 202 [section 1302], "Constitutional rights"; and section 203 [section 1303], "Habeas corpus".

Section 204(a) grants Federal district courts jurisdiction of civil actions alleging a denial of rights enumerated in section 202 of the act. The subsection also prohibits the defense of sovereign immunity in civil actions brought to enforce compliance with section 202.

Subsection 204(b) provides an individual, or the Attorney General, with a right of action in the Federal district courts for declaratory, injunctive or other equitable relief if a tribe fails to comply with the individual's civil rights provided by the act. This subsection requires, as a prerequisite to an aggrieved individual's filing suit, the exhaustion of tribal remedies. The tribal remedies, however, must be timely and reasonable under the circumstances so that an individual is protected from dilatory governmental decisionmaking. The Attorney General is not subject to the exhaustion requirement of this subsection.

Relief is strictly limited by subsection 204(b), whether the plaintiff is an aggrieved individual or the Attorney General, to equitable relief, such as a declaratory judgment, an injunction, or other nonmonetary equitable remedies. The equitable relief may be granted against an Indian tribe, tribal organization, or tribal official.

Subsection 204(c) compels Federal district courts to adopt the findings of fact of tribal courts when such findings have been made, unless the Federal district court makes a determination that one of eight listed irregularities occurred respecting the tribal court's procedures. Only in the event of one of the following irregularities, will the Federal court conduct a de novo review of the case:

(1) "The tribal court was not fully independent from the tribal legislative or executive authority." As used in subsection 204(c)(1), "fully independent from the tribal legislative or executive authority" means a separate and

autonomous tribal judiciary which (as in the case of the federal and state governments) is free from the control of other branches of government. In deciding questions of judicial independence, the language quoted above is meant to apply standards no more rigorous than those applicable to state court judges. For example see American Bar Association, Code of Judicial Conduct, Canon 1 ("A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."). Nothing in this subsection is meant to restrict the appropriate discipline of judges who violate established canons of judicial ethics or published standards of judicial conduct. Evidence of judicial misconduct, such as improper ex-parte communications with counsel for a litigating party, may under appropriate circumstances also serve as the basis for a finding of a lack of judicial independence.

(2) "The tribal court was not authorized to or did not finally determine matters of law and fact." As used in subsection 204(c)(2), "authorized" refers to authorization by tribal constitution, statute, or ordinance.

(3) The tribe or those subject to the Act are allowed to interpose a defense of immunity.

(4) The merits of the factual dispute have not been resolved.

(5) The factfinding procedure employed did not adequately afford a full and fair hearing.

(6) The material facts are not adequately developed.

(7) A full, fair, and adequate hearing was not provided.

(8) The factual findings are not fairly supported by the record.

Subsection 204(d) required the Federal court to accord due deference to the interpretation of the tribal court of tribal laws and customs whenever a question of tribal law is at issue.

Mr. President, the bill that I am introducing today strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self-government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act. It was endorsed by the administration last year and I am reintroducing it in the same form. I would encourage my colleagues to carefully examine this issue and support this effort to protect the rights of all Americans.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 517

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Indian Civil Rights Act Amendments of 1989".

SEC. 2, Title II of the Civil Rights Act of 1963 (Public Law 90-284, 25 U.S.C. 1301 et seq.), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding at the end thereof the following new section:

"CIVIL ACTIONS

"SEC. 204. (a) Compliance With Section 202. Federal district courts shall have jurisdiction of

civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

"(b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

"(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that:

"(1) the tribal court was not fully independent from the tribal legislative or executive authority;

"(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

"(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive or other equitable relief, to interpose a defense of immunity;

"(4) The tribal court failed to resolve the merits of the factual dispute;

"(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

"(6) the tribal court did not adequately develop material facts;

"(7) the tribal court failed to provide a full, fair, and adequate hearing; or

"(8) the factual determinations of the tribal court are not fairly supported by the record,

in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

"(d) In any civil actions brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs.".

U.S. DEPARTMENT OF JUSTICE,
CIVIL RIGHTS DIVISION,
Washington, DC, January 24, 1989.

Re: Allegations of ICRA Violations Post Santa Clara Pueblo versus Martinez

MR. WILLIAM HOWARD,
General Counsel, U.S. Commission on Civil Rights, Washington, DC.

DEAR BILL: As requested, I have enclosed a summary of alleged ICRA violations contained in our files. The summary includes only those matters or allegations brought to our attention subsequent to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). I have not included other claims of ICRA violations from sources such as the Indian Law Reporter, litigated federal cases or the available literature. I did, however, include matters reported in the news media and note that certain matters outlined below may also have been made available to the Civil Rights Commission. In addition, because we are no longer engaged in ICRA enforcement activity,

the allegations contained in the summary remain unverified.

The 71 separate complaints listed below allege a total of 98 violations of the ICRA. The complaints name 32 different Indian tribes located in 12 states. Areas with the heaviest complaint activity include tribes located in South Dakota with 25 complaints, Arizona with 15 complaints and Minnesota with 10 complaints. One tribe is the subject of 14 separate complaints, some of which allege more than one ICRA violation, and 3 other tribes are the subject of 10, 7 and 6 complaints respectively. The remaining 28 tribes are named in one or two ICRA complaints.

The 98 alleged ICRA violations may be categorized as follows:

	Alleged violations	*Number of allegations*
1.	Tribal court practices	28
2.	Voting or election complaints	25
3.	Hiring or employment irregularities	12
4.	Tribal council activity generally	5
5.	Free press infringements	5
6.	Housing assignment policies	4
7.	Right to counsel allegations	3
8.	Taking of private property without compensation	2
9.	Vague criminal statutes	1
10.	Child custody procedures	1
11.	Jail conditions	1
12.	Membership practices	1
13.	Cruel and unusual punishment	1
14.	Improper removal from the reservation	1

15. Arrest and search procedures	1
16. Racial discrimination.....	1
Total	98

By year, the 712 complaints of ICRA violations can be broken down as follows:

Year	*Number of complaints*
1978.....	4
1979.....	6
1980.....	2
1981.....	1
1982.....	4
1983.....	2
1984.....	1
1985.....	6
1986.....	13
1987.....	11
1988.....	21

I hope you find this information useful. If you should have any questions, please call the undersigned on 633-4701.

Sincerely,

JAMES P. TURNER.
Acting Assistant Attorney General,
Civil Rights Division.
JAMES M. SCHERMERHORN,
Special Litigation Counsel

U.S. DEPARTMENT OF JUSTICE-IRCA COMPLAINTS POST SANTA CLARA PUEBLO VERSUS MARTINEZ

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